

# Montana Legal Services Association

*Provide, protect and enhance access to justice.*



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## MEMO

EXHIBIT 4  
DATE 3/17/15  
SB 371

To: House Judiciary Committee  
From: Amy Hall, attorney with MLSA *AH*  
RE: SB 371 – revising landlord-tenant property laws concerning tenant noncompliance and termination  
Primary sponsor: Mark Blasdel  
Date: March 17, 2015

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Good morning, Mr. Chairman and members of the Committee:

My name is Amy Hall. I am an attorney with Montana Legal Services Association, a nonprofit organization that provides civil legal assistance to Montanans living in poverty. I have provided legal representation to low-income renters throughout Montana for more than nine years.

I am here on behalf of MLSA to express concerns about SB 371. This bill, if passed, would affect many of the Montanans who request assistance from MLSA concerning rental disputes. This bill would amend Montana law to make it much easier for landlords to collect fees of questionable validity from renters.

Those renters are my neighbors, and yours. They are Montanans with permanent disabilities, single parents working two jobs to make ends meet, State employees, seniors, young professionals who have recently moved to Montana.

In my work, I have encountered many landlords who do a fantastic job of running their rental business and following the applicable laws. But, there seems to be a trend for landlords to add various fees to their leases – for example, a \$25.00 fee for each time the landlord sends a notice or letter to the renter, a \$200.00 fee if the renter moves out before the end of the lease, a \$50.00 fee if the tenant's rent check is returned by the bank for insufficient funds. This bill, if passed, would give the Legislature's approval to those kinds of fees, which

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sometimes may not have any relationship to any costs suffered by the landlord – the fees are merely intended as penalties against the renters.

For example, this bill would give tacit approval to a landlord's late fees, early termination penalties, and nonpayment penalties, each of which is referenced in the bill. A "nonpayment penalty" is referenced at p. 2, line 17, and p. 3, line 7. In my many years representing tenants in Montana, I have never encountered a "nonpayment penalty" and I'm not sure what that is. Does it mean that if a tenant fails to pay the rent by the 1<sup>st</sup>, the landlord can assess a penalty against a tenant? And presumably the nonpayment penalty would be in addition to any late fee? That would mean that a tenant who is short only \$50.00 on her rent could be charged the landlord's late fee, which could be \$25 or more, plus a "nonpayment penalty" in whatever amount the landlord has put in the lease.

### **Removing "Upon a date specified in the notice"**

First of all, on page 1, line 18 and on page 3, line 16, the bill proposes to remove the requirement for the landlord in a termination notice to the tenant to specify the date that the tenant's rental agreement will terminate. That information – the date of termination – is crucial for both landlord and tenant to know. It's in the landlord's interest to be very clear with the tenant about the date of termination. Attached is an actual (redacted) notice of termination sent to a tenant. It's dated October 20, 2014. It was mailed to the tenant, and she received it days later. The notice does not specifically inform the tenant by what date she must move. Montana law [Section 70-24-108(1)(c), MCA] provides that when a notice is mailed, it is effective 3 days after the date of mailing. So legally, this renter had until October 26 to vacate. It would be much clearer for this notice to state specifically, in addition to the existing text in the letter – "You must vacate by October 26, 2014." Then the landlord would clearly know, and the tenant would clearly know exactly what date the tenant is required to vacate. Also, some landlords fail to include any date at all on their notices of termination – the letter itself is undated. That makes it even harder for a tenant to know clearly by when she must vacate. It is unclear what benefit anyone would gain by removing this language from the existing statute.

### **"Late fees and unpaid utility bills"**

On page 2, line 1 and on page 5, line 16, this bill inserts language into the existing statute to require a tenant to pay "late fees, and unpaid utility bills" within 3 days after receiving the written notice from the landlord. Often MLSA assists

renters who have legitimate objections to a landlord's fees or charges. In one dispute, the landlord's lease provided a late fee of \$20.00 per day if the rent is not paid by the first of the month. That's a late fee of \$600.00 for one month, if the rent isn't paid until the end of the month. This proposed change in the law would require the renter to pay the full late fee to the landlord, along with the rent due, if the renter wanted to avoid a court action for eviction.

Further, the tenant who didn't vacate, perhaps because she couldn't pay the \$600 late fee even though she paid the total rent due, would be considered "purposefully holding over" in the rental, which would subject her to treble damages under Section 70-24-429, MCA. It is not reasonable for our state law to allow treble damages to be assessed against a tenant who pays the rent in full, and only owes late fees or utility bills.

Concerning payment of utility bills, in many rentals, the tenant is responsible for paying the utility bills directly to the electric company or other service provider. The utility account is in the tenant's name, and is the tenant's responsibility, not the landlord's. This bill's requirement that a tenant pay all unpaid utility bills within 3 days to avoid termination could have devastating effects on Montana renters. Perhaps the tenant has entered a payment plan with the utility company on her account, and is in good standing with her payments, but still owes a balance. Why would we want the law to allow the landlord to terminate the tenant's tenancy unless she pays the full balance to the utility company within 3 days of the landlord's notice?

### **Deeming the Tenant's Occupancy a Purposeful Holdover**

The bill provides that if a tenant fails to pay the rent, late fees, and unpaid utility bills within the deadline given in the landlord's written notice, then "the tenant's occupancy is considered a purposeful holdover pursuant to 70-24-429 [or 70-33-429 for mobile home lot rentals]." Those sections are on p. 2, lines 4-5 and on p. 5, lines 18-19 of the bill.

Once a tenant's occupancy is found to be a purposeful holdover, that finding subjects the tenant to treble damages under Sections 70-24-429 and 70-33-429. Those statutes currently provide: "If the tenant's holdover is purposeful and not in good faith, the landlord may recover an amount of not more than 3 months' rent or treble damages, whichever is greater."

The finding of whether a tenant's holdover is purposeful is currently made by the trier of fact in a landlord-tenant lawsuit. The trier of fact is either a jury, or a judge. This bill would take that finding out of the decision-making realm of the trier of fact, and a finding of purposeful holdover would be automatic if a tenant doesn't pay the money demanded by the landlord.

It is preferable to let the trier of fact make the decision about whether a tenant's continued occupancy is purposeful and not in good faith, after hearing both sides of the parties' dispute. Judges or juries are in the best position to hear all of the evidence and decide whether a tenant deserves to be assessed a holdover penalty of up to 3 times the rent or treble damages. In several cases in which MLSA has represented tenants in court, the judge has granted the landlord the right of possession of the premises, but denied the landlord the recovery of holdover damages. Where the judge believes that the tenant had a colorable claim under the law for not paying the full amount demanded by the landlord – perhaps the amount of the late fee is unconscionable under Section 70-24-404 or 70-33-403, MCA -- the judge has the power under current law to deny the landlord's recovery of treble damages. If this bill passes, judges will no longer have that discretion.

#### **Adding “a nonpayment penalty” and “early termination penalties”**

On page 2, lines 16-17 and on page 3, lines 6-7, this bill allows the landlord to recover “a nonpayment penalty” and “early termination penalties” in the amounts defined in the rental agreement. These provisions directly contradict existing Montana law. The Montana Residential Landlord and Tenant Act, Title 70, Chapter 24, MCA, and the Montana Residential Mobile Home Lot Rental Act, Title 70, Chapter 33, MCA, do not specifically authorize or prohibit the charging of fees for nonpayment or early termination of a lease. However, Section 28-2-721, MCA, (copy attached) which applies to all contracts, including leases, provides that every contract that specifies the amount of damage to be paid for a breach, set in anticipation of such breach, is void, unless, from the nature of the case, it would be impracticable or extremely difficult to set in advance the amount of actual damage. For a landlord, it is never impracticable or extremely difficult to set in advance the amount of actual damage resulting from a tenant's nonpayment of rent – it would be the amount of the rent left unpaid. Similarly, the amount of actual damage from a tenant's early termination of the lease would be the amount of rent left to be paid under the lease, after the costs of re-renting the rental to a new tenant are subtracted. Those lost-rent damages are already recoverable by landlords under existing law – see Section 70-24-401(1), MCA, and *Summers v. Crestview Apartments*, 2010 MT 164, 357 Mont. 123, 236 P.3d 586. It

is not clear why the law would need to be amended to allow a landlord to recover additional "early termination penalties" when the landlord is already entitled under existing law to recover its actual damages related to the renter moving out before the end of the lease.

**Correction: Homeowners renting a mobile home lot have 7 days to pay rent, not 3 days**

On page 5, line 16, there is likely an inadvertent error. This portion of the bill applies only to rentals of mobile home lots. The statute to be amended, Section 70-33-433, MCA, currently requires that a mobile-homeowner who is only renting a lot for the home must be given 7 days notice to pay the rent due (see page 3, lines 19-20 of the bill), not the 3 days' notice that is required for non-mobile home rentals. But on page 5, line 16 of the bill, the bill provides that if rent is not paid by a mobile homeowner within "3 days" "three or more times within a 12-month period..." For the bill to be accurate, the "3 days" in that phrase should be changed to "7 days", since mobile homeowners have 7 days, not just 3 days, to correct any nonpayment-of-rent violation. MLSA points out this error, even though MLSA maintains, as described in the previous sections, that the entire bill should be rejected.

**A hypothetical example**

Based on my experience representing renters, below is a hypothetical situation which could arise if SB 371 passes:

Tina owns her own mobile home, and rents a lot from Landlord. She has one child living with her, and has lived there for 5 years. She currently has a one-year lease which ends in 6 months. The rent is \$320.00 per month. The lease provides a late fee of \$50 if rent is not paid by the 5<sup>th</sup>, and \$20 per day thereafter. It also provides a penalty of \$100 if she doesn't pay the rent by the 20<sup>th</sup> of the month. She has never paid any attention to those fees in her lease, because she has paid her rent on time for 5 years. Then, Tina and her child are in a car wreck on the 3<sup>rd</sup> of the month, not their fault. Tina was fired from her job, because she was hospitalized and didn't call in sick. Tina does not have any savings and cannot pay the rent by the 20<sup>th</sup> of that month. She contacts Landlord, and asks for more time. Landlord refuses. Tina gets out of the hospital and gets help with the rent and fees from a local nonprofit. On the 25<sup>th</sup>, Tina pays Landlord \$320.00 rent, plus an extra \$25.00 to go toward fees. Landlord demands payment of the additional \$475.00 provided for under the lease -- \$100 for the nonpayment fee and \$375 in

additional late fees (\$20 per day x 20 days minus the \$25 paid by Tina). When Tina can't pay the additional \$475.00 [note that this amount for fees and penalties is more than the monthly rent], Landlord sends Tina a notice to pay or vacate, and then files a court action for possession. If SB 371 is passed, the judge could enter an eviction judgment against Tina, for the \$475 in additional fees, plus trebling the landlord's damages or the monthly rent under Section 70-33-429, MCA, if Tina's noncompliance (her late payment of rent) is found to be "purposeful" and "not in good faith." As a result of the court decision of eviction, Tina could lose her mobile home if she can't afford to pay the costs to move her home off the lot. What a drastic end result for Tina and her child -- all for a renter who paid the rent in full by the 25<sup>th</sup> of the month, along with \$25 extra to the landlord. Additional fees imposed by landlords in rental agreements can have devastating effects on renters.

### **Conclusion**

The passage of SB 371 would have detrimental effects on Montana renters. Existing Montana law adequately protects landlords by allowing them to recover appropriate damages when the renter breaches a lease (Section 70-24-401 and 70-33-401, MCA), by allowing landlords the possibility of treble damages (Section 70-24-429 and 70-33-429, MCA) and attorney fees (Section 70-24-442 and 70-33-434, MCA). The primary purpose of this bill seems to be to make it easier for landlords to collect nonpayment penalties, early termination penalties, and late fees against tenants. Such penalties may run afoul of Montana contracts law (Section 28-2-721, MCA, attached) and should not be promoted by acknowledgment in Montana landlord-tenant law.

Thank you for your consideration.

# 3-DAY NOTICE TO TERMINATE RENTAL AGREEMENT

DATED THIS THE 20th day of October, 2014.

You are hereby given 3 days notice to quit and vacate the premises as provided in §§ 70-24-321, 70-24-422(3), MCA.

Description of Damages: You or your guests have violated § 70-24-321(2)-(3), MCA which provides in relevant part:

- (2) A tenant may not destroy, deface, damage, impair, or remove any part of the premises or permit any person to do so.
- (3) A tenant may not engage or knowingly allow any person to engage in any activity on the premises that creates a reasonable potential that the premises may be damaged or destroyed or that neighboring tenants may be injured, including but not limited to any of the following activities:... (e) any activity that is otherwise prohibited by law.

You have, or are responsible for a door being broken and there is damage in bedroom #2.

- I. You are hereby given notice to vacate the premises within three days of this notice, not inclusive of the day you received this Notice. If you remain on the property, you may be held responsible for treble rent or damages as a holdover tenant pursuant to § 70-24-429 MCA.
- II. This is in no way a waiver of Landlord's rights to fully allege all causes of action against you in the appropriate court of law.

## Montana Code Annotated 2014

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**28-2-721. When provision fixing liquidated damages valid.** (1) Every contract by which the amount of damage to be paid or other compensation to be made for a breach of an obligation is determined in anticipation thereof is to that extent void, except as expressly provided in subsection (2).

(2) The parties to a contract may agree therein upon an amount which shall be presumed to be an amount of damage sustained by a breach thereof when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

**History:** En. Secs. 2243, 2244, Civ. C. 1895; re-en. Secs. 5054, 5055, Rev. C. 1907; re-en. Secs. 7556, 7557, R.C.M. 1921; Cal. Civ. C. Secs. 1670, 1671; Field Civ. C. Secs. 830, 831; re-en. Secs. 7556, 7557, R.C.M. 1935; R.C.M. 1947, 13-804, 13-805.

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